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PATENT
Customer No. 22,852
Attorney Docket No. 05725.1001

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:)
)
Jacques SEBBAN)
) Group Art Unit: 3732
Application No.: 09/980,254)
) Examiner: D. Comstock
Filed: February 8, 2002)
) Confirmation No.: 1052
For: MAKE-UP TYPE HOUSING)
)
) COMPRISING AN ARTICULATED)
)
) LID)

Mail Stop Appeal Brief - Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

TRANSMITTAL OF APPEAL BRIEF (37 C.F.R. 41.37)

Transmitted herewith is the Appeal Brief in this application with respect to the
Notice of Appeal filed on March 15, 2005.

This application is on behalf of:

☐ Small Entity ☒ Large Entity

Pursuant to 37 C.F.R. 41.20(b)(2), the fee for filing the Appeal Brief is:

☐ \$250.00 (Small Entity) ☒ \$500.00 (Large Entity)


☒ Enclosed is a check for \$500.00 to cover the Appeal Brief fee.

PETITION FOR EXTENSION. If any extension of time is necessary for the filing of this
Appeal Brief, and such extension has not otherwise been requested, such an extension

is hereby requested, and the Commissioner is authorized to charge necessary fees for such an extension to our Deposit Account No. 06-0916.

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: May 16, 2005

By:  (Reg. No. 50,585)
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Sir:

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

This is an appeal to the Board of Patent Appeals and Interferences ("the Board") from the final Office Action dated November 16, 2004 ("Final Office Action"), finally rejecting claims 15-44, in the above-referenced patent application. Pursuant to 37 C.F.R. § 41.37, Appellant submits one copy of this Appeal Brief (37 C.F.R. § 41.37(a)(1); Rules of Practice Before the Board of Patent Appeals and Interferences, 69 *Fed. Reg.* 49962 (Aug. 12, 2004) (to be codified at 37 C.F.R. Parts 1, 5, 10, 11 and 41)), accompanied by the fee (\$500.00) set forth in 37 C.F.R. § 41.20(b)(2).

A Notice of Appeal was filed on March 15, 2005, this Appeal Brief is being timely filed within two months from the filing date of the Notice of Appeal under 37 C.F.R.

§ 41.31.

05/17/2005 JADD01 00000039 09980254

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I. Real Party in Interest

The real party in interest is L'Oréal S.A., the assignee of the entire right, title, and interest in the application, as indicated by assignment duly recorded in the U.S. Patent and Trademark Office at Real 012618, Frame 0647 on February 8, 2002.

II. Related Appeals and Interferences

Appellant, Appellant's legal representatives, and assignee are aware of no other appeals, interferences, or judicial proceedings that may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in this appeal.

III. Status of Claims

Claims 15-44 are pending in this application. Claims 15-44, as set forth in the Claims Appendix, have been finally rejected in the Final Office Action and the rejections applied to those claims are at issue in this appeal.

IV. Status of Amendments

No amendments under 37 C.F.R. § 1.116 have been filed subsequent or in response to the Final Office Action.

V. Summary of Claimed Subject Matter

A. Claims 15-32

The subject matter set forth in claim 15 relates to a case 1, 101 for a product P, comprising a base 2, 102, an intermediate element 20, 120, and a lid 4, 104. Figs. 1-6, 7a, and 7b.¹ The base 2, 102 defines at least one housing 2a, 102a configured to contain a product P. Page 4, lines 6-8; page 8, lines 14-16; Figs. 1-6, 7a, and 7b. The base 2, 102 includes a first catch member B. Page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The housing 2a, 102a includes an opening extending substantially in a plane X. Page 4, lines 15-16; Figs. 1-6. The intermediate element 20, 120 includes a second catch member C configured to engage with the first catch member B to irreversibly lock the intermediate element 20, 120 to the base 2, 102. Page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The lid 4, 104 is articulated on the base 2, 102 via the intermediate element 20, 120. Page 4, lines 8-11; page 8, lines 27-28; Figs. 1-6, 7a, and 7b. The intermediate element 20, 120 is configured to pivot relative to both the lid 4, 104 and the base 2, 102 so as to allow the lid 4, 104 to pivot through 360° relative to the base 2, 102. Page 3, lines 29-32; page 4, lines 8-11; page 9, lines 27-31; Figs. 1-6, 7a, and 7b.

According to an exemplary aspect, the case 1, 101 is configured so that when the first catch member B and the second catch member C engage to irreversibly lock the intermediate element 20, 120 to the base 2, 102, the intermediate element 20, 120 is arranged substantially entirely on one side of said plane X. Page 3, lines 12-17; Page 6, lines 1-2; page 10, lines 24-27; Figs. 5, 6, and 7b.

¹ The references to the specification and drawings in this Brief are merely intended to facilitate explaining how the originally-filed application provides exemplary embodiments and exemplary disclosure relating to the claimed subject matter. Those references should not be construed as limiting the claims.

This claimed configuration enables, as best shown in Figs. 3 and 7a, the lid 4, 104 to be placed under the base 2, 102 before the first use, such that the product P contained in the base 2, 102 may be visible from outside. Page 9, line 27 - page 10, line 7. Moreover, the claimed configuration enables, after the first use, the intermediate element 20, 120 to be irreversibly locked to the base 2, 102 so as to immobilize the intermediate element 20, 120 relative to the base 2, 102 and to only allow pivoting of the lid 4, 104 with respect to the intermediate element 20, 120 over a limited angle of rotation. Page 6, lines 1-7; page 10, lines 18-27; Figs. 5 and 6. The irreversible locking of the intermediate element 20, 120 and the base 2, 102 causes the maximum angle of rotation between the lid 4, 104 and the intermediate element 20, 120 to be reduced (e.g., to 180°, as best shown in Figs. 5 and 6), such that, for example, the elongation or whitening problem of the hinge material can be reduced. Page 4, lines 21-28.

According to another exemplary aspect, as set forth in claim 16, the case 1, 101 is configured so that when the first catch member B and the second catch member C engage to irreversibly lock the intermediate element 20, 120 to the base 2, 102, both the intermediate element 20, 120 and the base 2, 102 are arranged substantially entirely on said one side of the plane. Page 4, lines 18-19; Figs. 5, 6, and 7b.

In various exemplary aspects, as set forth in claim 17, the first catch member B and the second catch member C are configured to engage with one another via snap fitting. Page 5, lines 17-19; page 9, line 15-25; Figs. 5, 6, and 7b.

In some aspects, as set forth in claim 18, one of the first and second catch member B, C is configured to flex elastically in a direction perpendicular to a longitudinal

axis of the intermediate element 20, 120. Page 5, lines 19-22; page 9, lines 22-25; Figs. 5, 6, and 7b.

According to another aspect, as set forth in claim 19, the intermediate element 20, 120 comprises a first longitudinal edge 21, a second longitudinal edge 22 opposite the first longitudinal edge 21, a first articulation axis A_1 being located in the vicinity of the first longitudinal edge 21, and a second articulation axis A_2 being located in the vicinity of the second longitudinal edge 22. Page 5, lines 24-31; page 8, line 27 - page 9, line 5; Figs. 1-6, 7a, and 7b.

In some aspects, as set forth in claim 20, the case 1, 101 is formed as a single piece. Page 6, lines 19-20; page 8, lines 12-14. For example, in an exemplary aspect, the case 1, 101 is formed by molding, as set forth in claim 21. Page 6, lines 19-20; page 8, lines 12-14.

In another aspect, as set forth in claim 22, the first and second articulation axes A_1 , A_2 each comprise a film hinge 23, 24, 123. Page 6, lines 21-22; page 8, lines 30-31; page 9, lines 1-2; Figs. 1-6.

According to still another aspect, as set forth in claim 23, the case 1, 101 is made of polyolefin. Page 6, lines 28-31; page 11, lines 19-23. In an exemplary aspect, the polyolefin is polypropylene, as set forth in claim 24. Page 6, lines 28-31; page 11, lines 19-23.

In one aspect, as set forth in claim 25, at least one of the first and second articulation axes A_1 , A_2 comprises an attached pin hinge 124. Page 6, lines 22-28; page 11, lines 13-17; Figs. 7a and 7b. In an exemplary aspect, the base 2, 102 and the intermediate element 20, 120 are connected by a film hinge 23, 123 and the lid 4, 104

and the intermediate element 20, 120 are connected by the attached pin hinge 124, as set forth in claim 26. Page 6, lines 22-28; page 11, lines 13-17; Figs. 7a and 7b.

In another aspect, as set forth in claim 27, the lid 4, 104 is made of a material chosen from urea formaldehyde, acrylobutadiene styrene, polyoxymethylene, and polystyrene acrylonitrile. Page 7, lines 2-5; page 11, line 32 - page 12, line 5.

In one aspect, as set forth in claim 28, the case 1, 101 further comprises product P contained in the housing 2a, 102a, wherein the product P comprises a cosmetic product P. Page 4, lines 6-7; page 8, lines 7-9. In an exemplary aspect, the cosmetic product P is a make-up product, as set forth in claim 29. Page 7, lines 8-10; page 8, lines 6-8.

According another aspect, as set forth in claim 30, the case 1, 101 defines a receptacle, and the at least one housing 2a, 102a comprises at least one compartment 2a, 102a defined in the receptacle. Page 7, lines 7-10; page 8, lines 14-16; Figs. 1-6, 7a, and 7b.

In various aspects, as set forth in claim 31, the case 1, 101 comprises a reversibly locking means 2b, 4b for reversibly locking the lid 4, 104 to the base 2, 102 in a closed position. Page 7, lines 15-16; page 8, lines 21-23; Figs. 1, 2, 5, and 6.

In one aspect, one of the first catch member B and second catch member C comprises a hook shape 31, and the other of the first catch member B and the second catch member C comprises an opening. Page 9, lines 15-22; Figs. 1-6, 7a, and 7b.

B. Claims 33-34

The subject matter set forth in claim 33 relates to a case 1, 101 for a product P, comprising a base 2, 102, an intermediate element 20, 120, and a lid 4, 104. Figs. 1-6,

7a, and 7b. The base 2, 102 defines at least one housing 2a, 102a configured to contain a product P. Page 4, lines 6-8; page 8, lines 14-16; Figs. 1-6, 7a, and 7b. The base 2, 102 includes a first catch member B. Page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The intermediate element 20, 120 includes a second catch member C configured to engage with the first catch member B to irreversibly lock the intermediate element 20, 120 to the base 2, 102. Page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The lid 4, 104 is articulated on the base 2, 102 via the intermediate element 20, 120. Page 4, lines 8-11; page 8, lines 27-28; Figs. 1-6, 7a, and 7b. The intermediate element 20, 120 is configured to pivot relative to both the lid 4, 104 and the base 2, 102 so as to allow the lid 4, 104 to pivot through 360° relative to the base 2, 102. Page 3, lines 29-32; page 4, lines 8-11; page 9, lines 27-31; Figs. 1-6, 7a, and 7b.

According to an exemplary aspect, the base 2, 102 defines a lateral wall 5 being delimited by both a first edge 50 adjacent the lid 4, 104 when the lid 4, 104 is in a closed position relative to the base 2, 102, as shown in Figs. 5 and 7b, and a second edge 51 opposite the first edge 50. Page 5, lines 1-6; page 9, lines 7-13; Figs. 1-6, 7a and 7b. The first catch member B is arranged along the lateral wall 5 at a distance from the first edge 50. Page 5, lines 1-6; page 9, lines 7-13; Figs. 1-6, 7a and 7b.

In various exemplary aspects, as set forth in claim 34, the case 1, 101 further comprises a product P contained in the housing 2a, 102a, wherein the product P comprises a cosmetic product P. Page 4, lines 6-7; page 8, lines 7-9.

C. Claims 35-37

The subject matter set forth in claim 35 relates to a case 1, 101 for a product P, comprising a base 2, 102, an intermediate element 20, 120, and a lid 4, 104. Figs. 1-6, 7a, and 7b. The base 2, 102 defines at least one housing 2a, 102a configured to contain a product P. Page 4, lines 6-8; page 8, lines 14-16; Figs. 1-6, 7a, and 7b. The base 2, 102 includes a first catch member B. Page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The intermediate element 20, 120 is formed as a single piece with the base 2, 102 and includes a second catch member C configured to mate with the first catch member B to lock the intermediate element 20, 120 to the base 2, 102. Page 6, lines 19-20; page 8, lines 12-14; page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The lid 4, 104 is articulated on the base 2, 102 via the intermediate element 20, 120. Page 4, lines 8-11; page 8, lines 27-28; Figs. 1-6, 7a, and 7b. The intermediate element 20, 120 is configured to pivot relative to both the lid 4, 104 and the base 2, 102 so as to allow the lid 4, 104 to pivot through 360° relative to the base 2, 102. Page 3, lines 29-32; page 4, lines 8-11; page 9, lines 27-31; Figs. 1-6, 7a, and 7b.

According to an exemplary aspect, the base 2, 102 defines a lateral wall 5 being delimited by both a first edge 50 adjacent the lid 4, 104 when the lid 4, 104 is in a closed position relative to the base 2, 102, as shown in Figs. 5 and 7b, and a second edge 51 opposite the first edge 50. Page 5, lines 1-6; page 9, lines 7-13; Figs. 1-6, 7a and 7b. The first catch member B is arranged along the lateral wall 5. Page 5, lines 1-6; page 9, lines 7-13; Figs. 1-6, 7a and 7b. The intermediate element 20, 120 rotates with respect to the base 2, 102 about an articulation axis A₁ arranged substantially at the second edge 51. Page 5, lines 11-15; page 8, line 27 - page 9, line 5; Figs. 1-6, 7a, and 7b.

In various exemplary aspects, as set forth in claim 36, the case 1, 101 further comprises a product P contained in the housing 2a, 102a, wherein the product P comprises a cosmetic product P. Page 4, lines 6-7; page 8, lines 7-9.

In another aspect, as set forth in claim 37, the base 2, 102 and the intermediate element 20, 120 are connected by a film hinge 23, 123. Page 6, lines 21-28; page 8, lines 30-31; page 9, lines 1-2; page 11, lines 13-17; Figs. 1-6, Figs. 7a and 7b.

D. Claims 38-40

The subject matter set forth in claim 38 relates to a case 1, 101 for a product P, comprising a base 2, 102, an intermediate element 20, 120, and a lid 4, 104. Figs. 1-6, 7a, and 7b. The base 2, 102 defines at least one housing 2a, 102a configured to contain a product P. Page 4, lines 6-8; page 8, lines 14-16; Figs. 1-6, 7a, and 7b. The base 2, 102 includes a first catch member B. Page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The housing 2a, 102a includes an opening extending substantially in a plane X. Page 4, lines 15-16; Figs. 1-6. The intermediate element 20, 120 is formed as a single piece with the base 2, 102 and includes a second catch member C configured to mate with the first catch member B to lock the intermediate element 20, 120 to the base 2, 102. Page 6, lines 19-20; page 8, lines 12-14; page 4, lines 12-15; page 9, lines 7-13; Figs. 1-6, 7a, and 7b. The lid 4, 104 is articulated on the base 2, 102 via the intermediate element 20, 120. Page 4, lines 8-11; page 8, lines 27-28; Figs. 1-6, 7a, and 7b. The intermediate element 20, 120 is configured to pivot relative to both the lid 4, 104 and the base 2, 102 so as to allow the lid 4, 104 to pivot through 360° relative to the base 2, 102. Page 3, lines 29-32; page 4, lines 8-11; page 9, lines 27-31; Figs. 1-6, 7a, and 7b.

According to an exemplary aspect, the case 1, 101 is configured so that when the first catch member B and the second catch member C mate to lock the intermediate element 20, 120 to the base 2, 102, the intermediate element 20, 120 is arranged substantially entirely on one side of said plane X. Page 3, lines 12-17; Page 6, lines 1-2; page 10, lines 24-27; Figs. 5, 6, and 7b.

In various exemplary aspects, as set forth in claim 39, the case 1, 101 further comprises a product P contained in the housing 2a, 102a, wherein the product P comprises a cosmetic product P. Page 4, lines 6-7; page 8, lines 7-9.

In another aspect, as set forth in claim 40, the base 2, 102 and the intermediate element 20, 120 are connected by a film hinge 23, 123. Page 6, lines 21-28; page 8, lines 30-31; page 9, lines 1-2; page 11, lines 13-17; Figs. 1-6, Figs. 7a and 7b.

E. Claim 41

The subject matter set forth in claim 41 is substantially similar to that of claim 15, except that the recitations “first catch member” and “second catch member” are replaced with “first means for catching” and “second means for catching.”²

F. Claim 42

The subject matter set forth in claim 42 is substantially similar to that of claim 33, except that the recitations “first catch member” and “second catch member” are replaced with “first means for catching” and “second means for catching.”³

² As the prosecution record indicates, neither the Examiner nor Appellant has invoked 35 U.S.C. § 112, six paragraph, for interpretation of the terms “first means for catching” and “second means for catching.” Accordingly, the Examiner construed the terms and the prior art under the “broadest reasonable interpretation” standard without considering whether the prior art means was equivalent to the corresponding structure, material or acts described in the present specification. Therefore, the scope of the “first means for catching” and “second means for catching” recitations should not be necessarily limited under 35 U.S.C. § 112, six paragraph, but instead be construed under the “broadest reasonable interpretation” standard.

G. Claim 43

The subject matter set forth in claim 43 is substantially similar to that of claim 35, except that the recitations “first catch member” and “second catch member” are replaced with “first means for catching” and “second means for catching.”⁴

H. Claim 44

The subject matter set forth in claim 44 is substantially similar to that of claim 38, except that the recitations “first catch member” and “second catch member” are replaced with “first means for catching” and “second means for catching.”⁵

³ Id.

⁴ Id.

⁵ Id.

VI. Grounds of Rejection to be Reviewed on Appeal

Claims 15-19, 25, 28-31, 33, 34, 41, and 42 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,078,159 to Yuhara ("Yuhara").

Claims 27 and 32 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Yuhara.

Claims 20-24, 26, 35-40, 43, and 44 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Yuhara in view of U.S. Patent No. 4,840,288 to Lunderman et al. ("Lunderman").

VII. Argument

A. **Rejection of claims 15-19, 25, 28-31, 33, 34, 41, and 42 under 35 U.S.C. § 102(b) based on Yuhara should be reversed because Yuhara lacks disclosure of each and every element of claims 15, 33, 41, and 42**

1. **Disclosure of Yuhara**

Yuhara discloses a compact case including a receptacle member 10 and a cover member 20 hinged with respect to the receptacle member 10 via a hinge 30. The receptacle member 10 has a first engaging projection 14 formed at the central portion of its front end face, and the cover member 20 includes a second engaging projection 23 integrally formed with a claw piece 22 at the central portion of its front end. The second engaging projection 23 is engageable and disengageable with the first engaging projection 14 to close and open the cover member 20, respectively, with respect to the receptacle member 10. See, e.g., Figs. 2, 3(a), and 3(b); col. 3, lines 43-46; col. 4, lines 1-6; col. 4, lines 61-68. The receptacle member 10 also includes a concave notch 15 at its rear end portion, and the hinge 30 is fitted within the notch 15. As best shown in Fig. 2, the receptacle member 10 includes a first engaging member 16 at the interior wall of the notch 15, and the hinge 30 includes a second engaging member 37 engageable with the first engaging member 16. Col. 3, lines 32-35; col. 3, lines 46-53; col. 4, lines 37-40.

As explained in more detail below, rather than disclosing a configuration that irreversibly locks, Yuhara unquestionably discloses that the first and second engagement members 16 and 37 are configured to be disengaged after being engaged. During assembly of Yuhara's case, the first engaging member 16 must be engaged with the second engaging member 37 in order to insert a shaft 31 into through holes 17, 38.

Col. 4, lines 48-58; Figs. 2 and 5. Thereafter, since the case is intended to be packaged with the upper face of the cover member 20 abutting against the bottom face of the receptacle member 10 for displaying a cosmetic 11, the second engaging member 37 must be “disengaged” from the first engaging member 16 by rotating the both cover member 20 and hinge 30 “with slightly strong force.” Col. 5, lines 31-46. Thus, applying a rotational force in the clockwise direction in Fig. 3(b) causes the second engaging member 37 to disengage from the first engaging member 16, which permits the cover member 20 to rotate about the second shaft 31 together with the hinge 30 so as to place the upper face of the cover member 20 against the bottom face of the receptacle member 10, as shown in Fig. 3(d). Col. 5, lines 31-46; Figs. 3(b) - 3(d).

2. Claims 15, 33, 41, and 42: Yuhara lacks disclosure of each and every element of claims 15, 33, 41, and 42

In order for a claim to be anticipated by a prior art reference under 35 U.S.C. § 102, each and every element in the claim must be found, either expressly or inherently, in a single prior art reference. Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987); and the identical invention must be shown in as complete detail as is contained in the claim. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1929 (Fed. Cir. 1989). See also M.P.E.P. § 2131. As discussed below, Yuhara does not anticipate at least independent claims 15, 33, 41, and 42 because it fails to disclose each and every element recited in each of those claims.

As discussed above in the Summary of Claimed Subject Matter section, independent claims 15 and 33 each recite, among other things, “a base ... including a

first catch member” and “an intermediate element including a second catch member configured to engage with the first catch member to **irreversibly lock** the intermediate element to the base” (emphasis supplied). Similarly, independent claims 41 and 42 each recite, among other things, “a base ... including first means for catching” and “an intermediate element including second means for catching, the first means for catching being engageable with the second means for catching to **irreversibly lock** the intermediate element to the base” (emphasis supplied). As explained below, Yuhara does not teach, or otherwise suggest, among other things, the claimed structural configuration of the first and second catch members (or the first and second means for catching), which renders an irreversible locking between an intermediate element and a base, as recited in each of claims 15, 33, 41, and 42.

In the Final Office Action, the Examiner alleged that the first and second engaging members 16, 37 of Yuhara correspond to the recited first and second catch members (or first and second means for catching), respectively. As is abundantly clear, however, the engagement between the first engaging member 16 of the receptacle member 10 and the second engaging member 37 of the hinge 30 does not irreversibly lock the hinge 30 to the receptacle member 10. Instead, the first and second engaging members 16, 37 are configured to reversibly engage with each other so as to allow rotation of the hinge 30 relative to the receptacle member 10 for display packaging, as discussed above.

Nevertheless, while admitting that the engagement between the first and second engaging members 16, 37 is a reversible locking when a “slightly strong force” is applied, the Examiner alleged that, “under normal conditions,” the engagement between

the first and second engaging members 16, 37 would be an irreversible locking. Final Office Action, sentence bridging pages 2 and 3.

Appellant disagrees with this allegation because, among other reasons, a locking between two members that are configured, and indeed intended, to be unlocked at least once after the locking, as is the case in Yuhara, must necessarily be, by definition, a **reversible** locking, not an irreversible locking, regardless of the condition by which the two members are locked or unlocked. Contrary to the plain meaning of “irreversible” locking, the Examiner’s distorted reasoning characterizes virtually every reversible locking mechanism as providing an irreversible locking because all reversible locking mechanisms provide, in one way or another, a temporary locking until such mechanisms are unlocked. Appellant submits that it is improper to arbitrarily allege that a device provides “irreversible” locking merely because it might remain in a locked condition during alleged “normal conditions.” All reversible locking mechanisms are configured and intended to be placed in a locked condition during their normal use in order to serve their purposes as a lock, yet such mechanisms clearly cannot be considered as providing irreversible locking.

The extreme flaws in the Examiner’s allegations relating to the engaging members 16, 37 are highlighted even further by the Examiner’s inconsistent interpretation of Yuhara’s engaging members 14, 23 and 16, 37. More specifically, even though the engaging members 14, 23 are analogous to the engaging members 16, 37 in that they are both engaged until a sufficient force is applied to disengage them, the Examiner considered the engagement between the engaging members 14, 23 as being a **reversible** locking (Final Office Action at page 3, lines 14-15). Since there is no

difference in operational characteristics between the engaging members 14, 23 and the engaging members 16, 37, other than possible frequency of disengagement, the engaging members 16, 37 clearly provide a reversible engagement just as the engaging members 14, 23 provide a reversible engagement.

The Examiner even acknowledged that the only difference between the “reversible” engaging members 14 and 23 and the engaging members 16 and 37 is their relative frequency of use. Final Office Action at paragraph bridging pages 5 and 6. Frequency of use, however, has no bearing in determining whether a locking mechanism can be characterized as providing “irreversible” locking, because frequency of use is not a structural feature.

Appellant submits that an “irreversible” locking plainly refers to, for example, a locking condition between two interlocking members, where the two members are permanently locked together after being locked together for the very first time. The description of the term “irreversible” locking throughout the specification and claims of this application is consistent with this plain meaning of “irreversible” locking.

As discussed above, Yuhara fails to disclose or suggest any structural configuration that renders an irreversible locking between the intermediate element and the base, as recited in independent claims 15, 33, 41, and 42.

Worth mentioning is that the Examiner alleged that “the catching means 16, 37 of Yuhara are well within at least a broadest reasonable interpretation of ‘irreversible,’” since under normal condition, the base 10 and the intermediate element 30 are not separated.” Final Office Action at page 5. This reflects that the Examiner has apparently broadened the scope of the term “irreversible” locking to mean “not

separated under normal condition.” Such an interpretation by the Examiner is clearly erroneous and unreasonable as it completely ignores the meaning of the term “irreversible” in the term “irreversible locking.” Indeed, the Examiner makes absolutely no distinction between “irreversible locking” and “locking.”

It is well established that “claim terms are presumed to have the ordinary and customary meanings attributed to them by those of ordinary skill in the art.” Sunrace Roots Enter. Co. v. SRAM Corp., 336 F.3d 1298, 1302, 67 USPQ2d 1438, 1441 (Fed. Cir. 2003). One of ordinary skill in the art would clearly understand that an “irreversible” locking plainly refers to a locking condition between two interlocking members, where the two members are permanently locked together after they are locked together for the very first time. The term “irreversible” locking clearly does not have a scope embracing the reversible locking between the receptacle member 10 and the hinge 30 of Yuhara.

For at least the reasons discussed above, Yuhara does not disclose “a base ... including a first catch member” and “an intermediate element including a second catch member configured to engage with the first catch member to irreversibly lock the intermediate element to the base,” as recited in independent claims 15 and 33, and “a base ... including first means for catching” and “an intermediate element including second means for catching, the first means for catching being engageable with the second means for catching to irreversibly lock the intermediate element to the base,” as recited in independent claims 41 and 42. Accordingly, Appellant submits that the rejection of independent claims 15, 33, 41, and 42 under 35 U.S.C. § 102(b) is improper and erroneous. Therefore, the 35 U.S.C. § 102(b) rejection of claims 15, 33, 41, and 42 should be reversed.

Claims 16-19, 25, and 28-31 depend, either directly or indirectly, from independent claim 15, and claim 34 depends from independent claim 33. Therefore, the rejection of claims 16-19, 25, 28-31, and 34 under 35 U.S.C. § 102(b) should also be reversed for at least the same reasons discussed above in connection with claims 15 and 33.

B. Rejection of claims 27 and 32 under 35 U.S.C. § 103(a) based on Yuhara should be reversed because claims 27 and 32 are patentable over Yuhara at least by virtue of their dependencies from independent claim 15

Dependent claims 27 and 32 each depend directly or indirectly from independent claim 15. As discussed above, independent claim 15 is patentable over Yuhara. Thus, at least by virtue of their dependencies from independent claim 15, claims 27 and 32 should also be patentable over Yuhara. Consequently, the rejection of claims 27 and 32 under 35 U.S.C. § 103(a) based on Yuhara should be reversed.

C. Rejection of claims 20-24, 26, 35-40, 43, and 44 under 35 U.S.C. § 103(a) based on the alleged combination of Yuhara and Lunderman should be reversed because the Examiner failed to establish a *prima facie* case of obviousness under 35 U.S.C. § 103(a)

1. Factual inquiries to determine obviousness

Several basic factual inquiries must be made in order to determine the obviousness or non-obviousness of claims of a patent application under 35 U.S.C. § 103. These factual inquiries, set forth in Graham v. John Deere Co., 383 U.S. 1, 17 (1966), require the Examiner to:

- (1) Determine the scope and content of the prior art;
- (2) Ascertain the differences between the prior art and the claims in issue;

- (3) Resolve the level of ordinary skill in the pertinent art; and
- (4) Evaluate evidence of secondary considerations.

The obviousness or nonobviousness of the claimed invention is then evaluated in view of the results of these inquiries. Id. at 17-18. In making this evaluation, the references must be considered as a whole, and must suggest the desirability and thus the obviousness of making the combination. See M.P.E.P. § 2141. The references must also be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention. Id. Additionally, a reasonable expectation of success is the standard with which obviousness is determined. Id. Furthermore, the Examiner bears the initial burden of factually supporting a determination of obviousness in the rejection of the claimed invention. See M.P.E.P. § 2142.

Thus, in order to carry the initial burden of establishing a *prima facie* case of obviousness that satisfies the Graham standard, the Examiner must satisfy three basic criteria. First, the prior art references when combined must teach or suggest all the claim elements. Second, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Finally, there must be a reasonable expectation of success. See M.P.E.P. § 2143.

Further, the Federal Circuit has emphasized the high burden for establishing a *prima facie* case of obviousness and the requirement for specificity in the evidence necessary to support a *prima facie* case. For example, in In re Kotzab, the Federal Circuit held that “[e]ven where obviousness is based on a single prior art reference teaching all of the individual elements of the claims, there must be a showing of a

suggestion or motivation to modify the teachings of that reference. In re Kotzab, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000). Whether this showing is based on an implicit or express showing in the reference, the Examiner “must provide particular findings related thereto.” Id. (citing In re Dembiczak, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999) (requiring a “clear and particular” suggestion to combine or modify prior art references)). In re Kotzab also reiterates the proposition that “broad conclusory statements standing alone are not ‘evidence’.” Id.

Additionally, in In re Lee, the Federal Circuit held that “[t]he factual inquiry whether to combine references must be thorough and searching. It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with.” 277 F.3d 1338, 1342, 61 U.S.P.Q.2d 1430, 1433 (Fed. Cir. 2002). Further, simply because references can be modified or combined is not sufficient basis to establish a *prima facie* case of obvious. In re Mills, 916 F.2d 680, 16 U.S.P.Q.2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01. And even if the claimed limitations are within the capabilities of one skilled in the art, such capabilities, by themselves, are not sufficient to establish a *prima facie* case of obviousness. In re Kotzab, 217 F.3d at 1370, 55 U.S.P.Q.2d at 1318; M.P.E.P. § 2143.01.

For the reasons set forth below, the Examiner has failed to meet the burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a).

2. Claims 20-24 and 26: Alleged combination of Yuhara and Lunderman does not teach or suggest all the claim elements recited in claims 20-24 and 26

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that the prior art

references, when combined, teach or suggest all the claim elements. See M.P.E.P. § 2143.

Dependent claims 20-24 and 26 depend from independent claim 15, and thus include all elements and limitations thereof. As explained above in the discussion of the 35 U.S.C. § 102(b) rejection, independent claim 15 is patentably distinguishable over Yuhara. Lunderman does not supply the above-noted deficiencies of Yuhara. That is, Lunderman fails to disclose or suggest, among other things, “a base ... including a first catch member” and “an intermediate element including a second catch member configured to engage with the first catch member to irreversibly lock the intermediate element to the base,” as recited in independent claim 15. Thus, at least by virtue of their dependency from independent claim 15, claims 20-24 and 26 should also be patentable. Consequently, the rejection of claims 20-24 and 26 under 35 U.S.C. § 103(a) based on the alleged combination of Yuhara and Lunderman should be reversed.

3. Claims 35, 38, 43, and 44: There is no suggestion or motivation in Yuhara or Lunderman to combine their alleged teachings

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that there is some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. See M.P.E.P. § 2143.

Whether this showing is based on an implicit or express showing in the reference, the Examiner “must provide particular findings related thereto.” Id. (citing In

re Dembiczak, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999)(requiring a “clear and particular” suggestion to combine or modify prior art references).

Moreover, “broad conclusory statements standing alone are not ‘evidence’.” Id.

In the present case, the Examiner has disregarded the above-discussed standard for establishing a *prima facie* case of obviousness. For example, while admitting Yuhara’s deficiency with respect to the recitation of “intermediate element [being] formed as a single piece with the base” in claims 35, 38, 43, and 44, the Examiner cited col. 3, lines 7-16 of Lunderman and alleged that cases with film hinges and cases with pin hinges are functionally equivalent and known in the art and that “it would have been obvious ... to substitute a case molded in a single piece and including film hinges for a case with pin hinges, as this is merely the substitution of functionally equivalent cases and hinge types known in the art.” Final Office Action at paragraph bridging pages 4 and 5. Appellant disagrees with this allegation because there is no suggestion or motivation in either Yuhara or Lunderman to combine or modify the alleged reference teachings in the manner alleged by the Examiner.

For example, Lunderman discloses a compact case having a double-pin hinge 16 that pivotally connects a lid 12 and a base 14 of the case. In an alternative arrangement, Lunderman teaches that the hinge 16 (i.e., a link 30) could be pivotally connected to the lid 12 and the base 14 by live hinges, whereby the lid 12, link 30, and base 14 would be formed as a single piece. Col. 3, lines 11-16 of Lunderman. Relying on this teaching of Lunderman, the Examiner expansively generalized that a case with film hinges and a case with pin hinges are allegedly functionally equivalent and that therefore it would have been obvious to substitute a case with pin hinges (i.e., Yuhara)

with a case molded in a single piece with film hinges (i.e., Lunderman) because it is a mere substitution of known, functionally equivalent cases.

Contrary to the Examiner's assertion, however, Lunderman does not teach that any case with a pin hinge is functionally equivalent to any case with a film hinge. Nor does it generalize that any pin hinge may be substituted with any film hinge. Instead, as discussed above, Lunderman merely discloses that, in a particular embodiment, its case may be formed of a single piece with live hinges connecting the lid 12 and the base 14. While such a substitution in Lunderman may not necessarily affect the functionality of its cases, that does not necessarily mean that such a substitution is universally applicable in all other compact cases having a pin hinge, because a pin hinge design may have different functional and/or aesthetic characteristics that cannot be substituted or reproduced by a film hinge, rendering such a substitution impractical and/or inappropriate.

For example, one of the main objectives of Yuhara is to improve the appearance of a case having first and second shafts provided on a receptacle member and a cover member, respectively, without integrally forming the receptacle member and cover. See col. 1, lines 59-68, of Yuhara. Since the first and second shafts form four holes at the rear end portion of the receptacle member and the cover member, thereby spoiling the appearance of the case, Yuhara provides a first concave notch 15 on the receptacle member 10 to accommodate a hinge 30 and a second concave notch 35 to accommodate a portion of the cover member 20, so as to hide the hinge 30 from exposure on the upper face of the cover member 20 or on the rear end of the receptacle member 10. See, e.g., col. 2, lines 17-22, and col. 5, lines 5-15, of Yuhara. That is,

Yuhara's invention is premised upon improving the appearance of cases having shafts that link a receptacle member and cover member, which necessarily precludes cases including an integrally formed receptacle member and cover member. Therefore, substituting the separately provided hinge 30 of Yuhara with an integrally formed film or live hinge, as proposed by the Examiner, would completely destroy the teachings of Yuhara and render Yuhara's teachings completely meaningless.

Moreover, the Examiner failed to provide any sufficient explanation as to why one of ordinary skill in the art would have been motivated to combine the asserted teachings of the references. The Examiner also failed to cite any evidence purporting to show that modifying the reference or combining reference teachings is in the knowledge generally available to one of ordinary skill in the art. As discussed above, Lunderman's mere disclosure of a case embodiment formed of a single piece with live hinges would not have provided a sufficient motivation to one of ordinary skill in the art to substitute any pin hinge with any film hinge. Instead, one of ordinary skill in the art would consider the disclosure of such a hinge arrangement as being limited to the particular embodiment disclosed in Lunderman

Appellant submits that the Examiner's asserted combination of references is a result of impermissible hindsight gleaned from the present application. When the references are viewed without such hindsight, the asserted combination of Yuhara and Lunderman would not be suggested since there is no "clear and particular" suggestion or motivation to make the Examiner's proposed combination or modification.

For at least these reasons, Appellant submits that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under

35 U.S.C. § 103(a). Thus, the rejection of claims 35, 38, 43, and 44 under 35 U.S.C. § 103(a) based on Yuhara and Lunderman should be reversed.

4. Claims 35, 38, 43, and 44: There is no reasonable expectation of success in Yuhara or Lunderman

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that there is a reasonable expectation of success. See M.P.E.P. § 2143. In the Final Office Action, however, the Examiner is completely silent as to any allegation of reasonable expectation of success in combining the alleged teachings of Yuhara and Lunderman.

Appellant submits that the alleged combination of Yuhara and Lunderman does not show a reasonable expectation of success because it is unclear as to how the complex structural configuration of Yuhara could be replaced or reproduced by the hinge of Lunderman.

For at least this reason alone, Appellant submits that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of claims 35, 38, 43, and 44 under 35 U.S.C. § 103(a) based on Yuhara and Lunderman should be reversed.

5. Claims 36-37 and 39-40 are patentable over the alleged combination of Yuhara and Lunderman at least by virtue of their respective dependencies from independent claims 35 and 38

Dependent claims 36 and 37 depend from independent claim 35, and claims 39 and 40 depend from independent claim 38. As discussed above, independent claims 35 and 38 are patentable over the alleged combination of Yuhara and Lunderman.

Thus, at least by virtue of their respective dependencies from independent claim 33 or

38, claims 36, 37, 39, and 40 should also be patentable over the alleged combination of Yuhara and Lunderman.

D. Conclusion

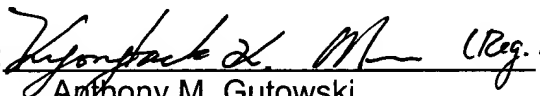
For the reasons given above, pending claims 15-44 are patentable over the cited references. The Board is therefore respectfully requested to reverse the outstanding rejections under 35 U.S.C. §§ 102(b) and 103(a), so that claims 15-44 may be allowed.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are any fees due which are not enclosed herewith, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: May 16, 2005

By:  (Reg. No. 57,535)
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VIII. Claims Appendix

15. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including a first catch member, and the housing including an opening extending substantially in a plane;

an intermediate element including a second catch member configured to engage with the first catch member to irreversibly lock the intermediate element to the base; and
a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base, and

wherein the case is configured so that when the first catch member and the second catch member engage to irreversibly lock the intermediate element to the base, the intermediate element is arranged substantially entirely on one side of said plane.

16. The case of claim 15, wherein the case is configured so that when the first catch member and the second catch member engage to irreversibly lock the intermediate element to the base, both the intermediate element and the base are arranged substantially entirely on said one side of the plane.

17. The case of claim 15, wherein the first catch member and the second catch member are configured to engage with one another via snap fitting.

18. The case of claim 15, wherein one of the first and second catch member is configured to flex elastically in a direction perpendicular to a longitudinal axis of the intermediate element.

19. The case of claim 15, wherein the intermediate element comprises:
a first longitudinal edge;
a second longitudinal edge opposite the first longitudinal edge;
a first articulation axis being located in the vicinity of the first longitudinal edge;
and
a second articulation axis being located in the vicinity of the second longitudinal edge.

20. The case of claim 19, wherein the case is formed as a single piece.

21. The case of claim 20, wherein the case is formed by molding.

22. The case of claim 20, wherein the first and second articulation axes each comprise a film hinge.

23. The case of claim 20, wherein the case is made of polyolefin.

24. The case of claim 23, wherein the polyolefin is polypropylene.

25. The case of claim 19, wherein at least one of the first and second articulation axes comprises an attached pin hinge.

26. The case of claim 25, wherein the base and the intermediate element are connected by a film hinge and the lid and the intermediate element are connected by the attached pin hinge.

27. The case of claim 25, wherein the lid is made of a material chosen from urea formaldehyde, acrylobutadiene styrene, polyoxymethylene, and polystyrene acrylonitrile.

28. The case of claim 15, further comprising product contained in the housing, wherein the product comprises a cosmetic product.

29. The case of claim 28, wherein the cosmetic product is a make-up product.

30. The case of claim 15, wherein the case defines a receptacle, and the at least one housing comprises at least one compartment defined in the receptacle.

31. The case of claim 15, further comprising a reversible locking means for reversibly locking the lid to the base in a closed position.

32. The case of claim 15, wherein one of the first catch member and second catch member comprises a hook shape, and the other of the first catch member and the second catch member comprises an opening.

33. A case for a product, comprising:
a base defining at least one housing configured to contain a product, the base including a first catch member;
an intermediate element including a second catch member configured to engage with the first catch member to irreversibly lock the intermediate element to the base; and
a lid articulated on the base via the intermediate element,
wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base,
wherein the base defines a lateral wall being delimited by both a first edge adjacent the lid when the lid is in a closed position relative to the base and a second edge opposite the first edge, and
wherein the first catch member is arranged along the lateral wall at a distance from the first edge.

34. The case of claim 33, further comprising a product contained in the housing, wherein the product comprises a cosmetic product.

35. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including a first catch member;

an intermediate element formed as a single piece with the base and including a second catch member configured to mate with the first catch member to lock the intermediate element to the base; and

a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base,

wherein the base defines a lateral wall being delimited by both a first edge adjacent the lid when the lid is in a closed position relative to the base and a second edge opposite the first edge,

wherein the first catch member is arranged along the lateral wall, and

wherein the intermediate element rotates with respect to the base about an articulation axis arranged substantially at the second edge.

36. The case of claim 35, further comprising a product contained in the housing, wherein the product comprises a cosmetic product.

37. The case of claim 35, wherein the base and the intermediate element are connected by a film hinge.

38. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including a first catch member, and the housing including an opening extending substantially in a plane;

an intermediate element formed as a single piece with the base and including a second catch member configured to mate with the first catch member to lock the intermediate element to the base; and

a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base, and

wherein the case is configured so that when the first catch member and the second catch member mate to lock the intermediate element to the base, the intermediate element is arranged substantially entirely on one side of said plane.

39. The case of claim 38, further comprising a product contained in the housing, wherein the product comprises a cosmetic product.

40. The case of claim 38, wherein the base and the intermediate element are connected by a film hinge.

41. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including first means for catching, and the housing including an opening extending substantially in a plane;

an intermediate element including second means for catching, the first means for catching being engageable with the second means for catching to irreversibly lock the intermediate element to the base; and

a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base, and

wherein the case is configured so that when the first means for catching and the second means for catching engage to irreversibly lock the intermediate element to the base, the intermediate element is arranged substantially entirely on one side of said plane.

42. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including first means for catching;

an intermediate element including second means for catching, the first means for catching being engageable with the second means for catching to irreversibly lock the intermediate element to the base; and

a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base,

wherein the base defines a lateral wall being delimited by both a first edge adjacent the lid when the lid is in a closed position relative to the base and a second edge opposite the first edge, and

wherein the first means for catching is arranged along the lateral wall at a distance from the first edge.

43. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including first means for catching;

an intermediate element formed as a single piece with the base and including second means for catching, the first means for catching being mateable with the second means for catching to lock the intermediate element to the base; and

a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base,

wherein the base defines a lateral wall being delimited by both a first edge adjacent the lid when the lid is in a closed position relative to the base and a second edge opposite the first edge,

wherein the first means for catching is arranged along the lateral wall, and

wherein the intermediate element rotates with respect to the base about an articulation axis arranged substantially at the second edge.

44. A case for a product, comprising:

a base defining at least one housing configured to contain a product, the base including first means for catching, and the housing including an opening extending substantially in a plane;

an intermediate element formed as a single piece with the base and including second means for catching, the first means for catching being mateable with the second means for catching to lock the intermediate element to the base; and

a lid articulated on the base via the intermediate element,

wherein the intermediate element is configured to pivot relative to both the lid and the base so as to allow the lid to pivot through 360° relative to the base, and

wherein the case is configured so that when the first means for catching and the second means for catching mate to lock the intermediate element to the base, the intermediate element is arranged substantially entirely on one side of said plane.

IX. **Evidence Appendix**

None

X. **Related Proceedings Appendix**

None